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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PARNELL COLVIN,

Case No. 2:20-cv-01765-APG-EJY

Plaintiff,

v.

**PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON LIABILITY**

Oral Argument Requested

M.J. DEAN CONSTRUCTION, INC.,

Defendant,

/

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is an employment discrimination case involving a construction company that is a contractor on the MSG Sphere project in Las Vegas, Nevada. The evidence produced in discovery shows this construction site was permeated with white supremacy in the form of an environment that allowed a supervisor to call a subordinate a "NIGGER" without any repercussion or action by the company to prevent future use of racial slurs. The evidence shows that after the "NIGGER" incident, racist graffiti was found in the bathroom, including graffiti that states, "Burn all NIGGERS...Trump 2020...White Power." The evidence shows that MJ Dean is not prepared or equipped to prevent or correct race discrimination on its job site. At the end of the day, MJ Dean allowed the supervisor who called his subordinate a "NIGGER" to fire that same employee months later under the guise of a lay off due to COVID-19. The facts show MJ Dean failed to properly train its management how to prevent and correct racism in the workplace, which led to a hostile work environment in violation of Title VII.

II. FACTUAL BACKGROUND

Plaintiff Parnell Colvin (“Colvin”) was hired by Defendant M.J. Dean Construction, Inc., (“MJ Dean”) to work on the MSG Sphere (“Sphere”) project on July 23, 2019. (*See* New Hire Package Requirements, attached to Appendix of Exhibits in Support of Plaintiff’s Motion for Partial Summary Judgment on Liability (“Appendix Vol. 1”) filed concurrently herewith, as Exhibit 3.) His supervisor at the time he was hired was Kevin Gutierrez (“Gutierrez”). (*See* Exhibit 3.) Colvin reported directly to Gutierrez. (*See* Deposition of Parnell Colvin, taken on July 15, 2021, attached to Appendix Vol. 1 as Exhibit 10, at 89: 2-4.)

Colvin filed his Charge of Discrimination with the EEOC and received a Right to Sue letter, dated June 25, 2020. (*See* Charge of Discrimination, attached to Appendix Vol. 1 as Exhibit 1; and *See* Notice of Right to Sue, attached to Appendix Vol. 1 as Exhibit 2.) Colvin filed his Complaint in this action on September 22, 2020. (*See* ECF Doc. 1.) Accordingly, this suit is timely.

A. MJ Dean’s involvement on the MSG Sphere Project

The Sphere project began construction in November/December of 2018. (*See* Deposition of John Thomason, taken on July 29, 2021, attached to Appendix Vol. 2 as Exhibit 14, at 8:21-23.) At that time, its expected time table for completion was 2019 to 2023. (*See* Exhibit 12, at 15:4-8.) MJ Dean’s role on the Sphere project is as the concrete subcontractor, in a joint venture with AECOM Hunt as a minority partner. (*See* Exhibit 12, at 15:9-17.)

John Thomason (“Thomason”) was the concrete superintendent on site and has been the Director of Field Operations for MJ Dean for the past four years. (*See* Exhibit 12, at 5:14-16 & 15:21-23.) He was the top MJ Dean executive on the project, owning a 4% share in MJ Dean. (*See* Exhibit 12, at 8:5-10 & 16:14-20.) Thomason has worked in management for MJ Dean for the past 25 years. (*See* Exhibit 12, at 5:24 to 6:9.) Thomason chose Gutierrez as General Foreman for the project, overseeing concrete (*See* Deposition of Kevin Gutierrez, taken on July 29, 2021, attached to Appendix Vol. 2 as Exhibit 11, at 7:1-3.)

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1 Paul Rosequist (“Rosequist”) has been the Project Safety Manager on the Sphere project
 2 since construction began. (*See* Deposition of Paul Rosequist, taken on August 6, 2021, attached
 3 to Appendix Vol. 2 as Exhibit 13, at 8:11-21.) Rosequist oversees OSHA compliance and is head
 4 of Safety at the Sphere project. (*See* Exhibit 13, at 9:5-14 & 12:8-10.)

5 MJ Dean does not have a department dedicated to Human Resources. (*See* Exhibit 12, at
 6 22:15-16.) Instead, Tommy Glidewell performs both the company’s human resource and
 7 information technology functions. (*See* Exhibit 12, at 22:15-19.)

8 **B. MJ Dean’s anti-discrimination, harassment, and termination policies**

9 MJ Dean’s Office Policy Manual states on its first page that “[t]he policies and procedure
 10 are intended to be guides to management and are merely descriptive of suggested procedures to
 11 be followed.” (*See* MJ Dean Office Policy Manual Excerpt, attached to Appendix Vol. 1 as
 12 Exhibit 4, at APP 008.) That manual also includes a letter from the President of the company,
 13 Michael Dean, stating, “We...hope that you find your association with the company to be an
 14 enriching and engaging work experience.” (*See* Exhibit 4, at APP 009.) MJ Dean commits itself
 15 to “providing an excellent work environment” for its employees and claims “zero tolerance” for
 16 workplace violence. (*See* Exhibit 4, at APP 010 and 012.) MJ Dean claims it “strives to maintain
 17 an environment free from discrimination and harassment,” including racial slurs as a form of
 18 harassment¹. (*See* Exhibit 4, at APP 014.) If an employee is subjected to harassment or
 19 discrimination, the employee is directed to inform his/her supervisor or may go to Human
 20 Resources. (*See* Exhibit 4, at APP 015.)

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26 ¹ The Anti-Harassment and Discrimination Policy contained in the Office Policy Manual
 27 is identical to the policy included in the MJ Dean Code of Safe Practices & Anti-Drug and
 28 Harassment Policies. (*See* MJ Dean Code of Safe Practices & Anti-Drug and Harassment
 Policies excerpt, attached to Appendix Vol. 1 as Exhibit 5, at APP 018-019.)

1 Gutierrez claims he is familiar with the anti-harassment policy and admits it is part of his
2 job to enforce those policies. (*See* Exhibit 11, at 21:3-13.) Gutierrez acknowledges that if he
3 heard racial slurs on the job he would report it to Rosequist in safety. (*See* Exhibit 11, at 22:15-
4 25 & 23:11-17.) Gutierrez did not report any racial or discriminatory comments to Rosequist
5 from 2019 through the date of his deposition on July 29, 2021. (*See* Exhibit 11, at 23:21-25.)

6 Its "Termination Processing Procedures" requires the employee's supervisor to notify
7 Human Resources of the termination. (*See* Exhibit 4, at APP 013.) Human Resources then
8 conducts an exit interview with the employee and provides the employee his/her final check at
9 the time of the exit interview. (*See* Exhibit 4, at APP 013.)

10 **C. Gutierrez was openly hostile to Colvin from the beginning.**

11 Beginning Colvin's first day of work, Gutierrez's treatment of Colvin was terrible. (*See*
12 Exhibit 10, at 94:10-13.) When Colvin would greet Gutierrez in the morning, Gutierrez "would
13 roll his eyes" and look at Colvin like he "was a piece of shit." (*See* Exhibit 10, at 95:2-4.) Colvin
14 began complaining to Gutierrez about this treatment in August of 2019. (*See* Exhibit 10, at
15 142:13-21.) Colvin complained to Tony in Safety about Gutierrez's hostility, to which Tony
16 responded that Gutierrez is a despicable person that he wanted to get rid of. (*See* Exhibit 10, at
17 149:19 to 150:1.) Colvin also complained to Superintendent Dave McGrandy ("McGrandy") in
18 August of 2019. (*See* Exhibit 10, at 150:21-23.)

19 Gutierrez put Colvin in various situations that were designed to ensure Colvin's failure.
20 (*See* Exhibit 10, at 95:5-9.) On approximately eight occasions, Gutierrez assigned Colvin
21 multiple tasks throughout the day that did not allow for the completion of those tasks. (*See*
22 Exhibit 10, at 95:10-6 and 158:3-5.) Gutierrez would have Colvin go work with other crews only
23 to have the people working on those crews ask why he was sent over because all the work was
24 already covered. (*See* Exhibit 10, at 95:19-21.) In September of 2019, Colvin confronted
25 Gutierrez on this issue and asked, "Why am I the only laborer that you constantly pick on and
26 send to work with other departments? And then when I get there, they don't even know why you
27 sent me there." (*See* Exhibit 10, at 145:16-19 & 146:1-13.) Gutierrez had no response to Colvin.

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1 (See Exhibit 10, at 148:1-5.) Colvin then complained to McGrandy about Gutierrez. (See Exhibit
2 10, at 148:6-10.) McGrandy told Colvin to “just keep your head down” and work. (See Exhibit
3 10, at 148:17-23.)

4 Shortly after Colvin began his employment Gutierrez prevented him from working
5 overtime. (See Exhibit 10, at 110:3-22.) One weekend, Gutierrez notified the laborers who would
6 get overtime that weekend. (See Exhibit 10, at 110:3-22.) Gutierrez would not give Colvin
7 overtime, claiming he has to give it to the laborers who started before him. (See Exhibit 10, at
8 110:17-18.) Colvin soon learned, however, that hispanic laborers who started after him were
9 given overtime, including Ricardo Flores (“Ricky”). (See Exhibit 10, at 110:19 to 111:5.) Even
10 when McGrandy gave Colvin overtime, Gutierrez continued to have a problem with it based on
11 his treatment of Colvin. (See Exhibit 10, at 112:17 to 113:15.)

12 On another occasion, Colvin and other laborers were cleaning up materials, including
13 nails, screws, and bolts. (See Exhibit 10, at 98:17 to 99:11.) Laborers typically use a wand with a
14 magnet on the end to pick up those materials. (See Exhibit 10, at 98:20-22.) Gutierrez
15 approached Colvin while he was using the wand and told him he would be fired for cleaning up
16 the materials that way, forcing Colvin to get down on his hands and knees to finish the clean-up.
17 (See Exhibit 10, at 98:24 to 99:8.) After Gutierrez left, the other laborers told Colvin that
18 everyone uses the wands and that Colvin was being singled out. (See Exhibit 10, at 99:8-11.)

19 Colvin does not believe that Gutierrez was properly trained based on his outward hostility
20 to Colvin. (See Exhibit 10, at 228:1-8.) Gutierrez did not treat Colvin like a human being or show
21 him any amount of respect like is expected from a leader. (See Exhibit 10, at 228:1-12.)

22 Gutierrez admits he never disciplined Colvin and admits Colvin was an “okay” employee
23 in terms of the work Colvin performed. (See Exhibit 11, at 24:17-23.) Gutierrez never wrote
24 Colvin up for his work performance. (See Exhibit 11, at 25:1-2.)

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D. Gutierrez's hostility toward Colvin escalated on November 14, 2019, when Gutierrez called Colvin a "NIGGER," evidencing his racial hatred toward Colvin.

Colvin was supervised by Gutierrez up until an incident that occurred on November 14, 2019. (See Exhibit 13, at 15:16-22.) On that date, early in the morning, Gutierrez approached Colvin asking him to work in a different area. (See Exhibit 10, at 126:21-22.) Colvin said, "Okay Kevin. No problem." (See Exhibit 10, at 126:22.) Colvin then asked, "But why am I the only laborer I know that you always come to move around? . . . We only have three laborers. And every crew you send me on, they have 10, 12 laborers working there. And when I get there" they ask "why did Kevin send you here?" (See Exhibit 10, at 126:23 to 127:3.) Colvin told Gutierrez that he was making Colvin look bad in front of the other laborers for sending him to do work that was already covered by other laborers. (See Exhibit 10, at 127:3-5.) Gutierrez's constant re-assignments to work somewhere else on the job site, only to be turned away, caused Colvin to walk around the whole job site, which made him look bad in front of the superintendents. (See Exhibit 10, at 127:3-5.) Colvin realized this was a pattern with Gutierrez because it is what foremans do when they want to get rid of a laborer. (See Exhibit 10, at 127:6-7.) Gutierrez wanted Colvin to walk around the job site all day chasing Gutierrez's futile tasks to make Colvin look like a laborer who was not pulling his weight. (See Exhibit 10, at 127:8-11.) Gutierrez was setting Colvin up for failure. (See Exhibit 10, at 127:12.)

Instead of giving Colvin a rationale response, Gutierrez exploded in anger. He began yelling, threw his hands in the air, and screamed, "I'M NOT FUCKING DOING THIS, YOU FUCKING NIGGER!" (See Exhibit 10, at 127:13-15.) Gutierrez also exclaimed, "I AM GIVING YOU TWO CHECKS," meaning he was firing Colvin for objecting to Gutierrez's hostility. (See Exhibit 10, at 16-18.) In response, Colvin exclaimed, "I'm tired of you harassing me. Man, you've been harassing me from day one. ... I'm here just to work like you to take care of my family. You've been picking on me, harassing. I don't even know you, so I don't know what the problem is. I'm just trying to work." (See Exhibit 10, at 128:2-7.)

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1 Colvin then went directly to the MJ Dean trailer to report this incident. (*See* Exhibit 10, at
2 129:6-9.) On his way there, he ran into George and Jim Lampley from AECOM Hunt, who asked
3 him what was wrong. (*See* Exhibit 10, at 102:1-14.) Colvin told them what happened with
4 Gutierrez, including that Gutierrez called him a “NIGGER.” (*See* Exhibit 10, at 102:4-14.)
5 George then went with Colvin to the MJ Dean trailer to notify John Thomason. (*See* Exhibit 10,
6 at 102:15-20; and *See* Exhibit 12, at 18:17-23.) Colvin told Thomason what happened with
7 Gutierrez. (*See* Exhibit 10, at 131:9-13.) Thomason called over Rosequist from Safety to handle
8 Colvin’s written report. (*See* Exhibit 10, at 159:18 to 160:2.) Colvin then typed out the Employee
9 Incident Investigation Report given to him to document the incident. (*See* Employee Incident
10 Investigation Report, attached to Appendix Vol. 1 as Exhibit 6.) Tony from Safety was also
11 present while Colvin reported the incident. (*See* Exhibit 10, at 130:17-20.) While he was filling
12 out the report, Thomason introduced Colvin to his new supervisor, Superintendent Dave Muti
13 (“Muti”). (*See* Exhibit 10, at 131:17-23.) Thomason reassigned Colvin’s supervision because
14 George told him that Gutierrez should no longer supervise or have any dealings with Colvin. (*See*
15 Exhibit 10, at 132:1-13.) After Colvin finished writing his report, Rosequist submitted it to
16 various people in the Safety department, including Rosequist, Jeff Kent (Safety Director), and
17 others on the “safety team.” (*See* Exhibit 13, at 12:11-22.)

18 Rosequist completed the investigation regarding this incident. (*See* Exhibit 13, at 13:5 to
19 14:21.) Gutierrez denied calling Colvin a “NIGGER.” (*See* Exhibit 11, at 43:9-14; and *See*
20 Exhibit 13, at 13:23-25.) After the investigation was completed, Rosequist went to Thomason
21 who discussed moving people around even though Thomason already moved Colvin while he
22 was writing his report. (*See* Exhibit 10, at 131:17-23; and *See* Exhibit 13, at 14:18-25.)

23 Colvin later requested to stay under the supervision of Superintendent MGrandy instead
24 of being moved. (*See* Text Messages between John Thomason and Parnell Colvin, attached to
25 Appendix Vol. 1, as Exhibit 7, at APP028.) Thomason and the superintendents still decided to
26 move Colvin, instead of moving Colvin’s harasser, Gutierrez. (*See* Exhibit 13, at 15:16-22.)

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1 George and Lampley followed-up with Colvin regarding Gutierrez, asking if he was still
2 bothering Colvin, and said that if he had any further problems to let them know because
3 Gutierrez was not supposed to have any dealings with Colvin. (See Exhibit 10, at 103:1-5.) They
4 followed up with Colvin approximately six times in passing. (See Exhibit 10, at 104:1-5.)
5 Gutierrez was still harassing Colvin through other black laborers telling them that Colvin was
6 talking about him. (See Exhibit 10, at 104:18-21.) This resulted in Colvin being contacted at
7 home by these laborers who told him that Gutierrez still had a vendetta against Colvin even
8 though he no longer supervised Colvin. (See Exhibit 10, at 104:18-25.)

9 **E. MJ Dean allowed racist graffiti in the bathrooms.**

10 On December 24, 2019, Colvin used a bathroom at the job site and found graffiti that
11 states: "BLACK LABORERS = LAZY!" (See Photos of Racist bathroom Graffiti, attached to
12 Appendix Vol. 1 as Exhibit 8, at APP033; and Exhibit 10, at 173:18-25.) This graffiti was found
13 in a bathroom about 50 yards away from the bathroom near his assigned area. (See Exhibit 12, at
14 168:5-10 & 174:3-5.) Colvin reported this graffiti to Tony and Julian from Safety. (See Exhibit
15 10, at 174:13-15.) Colvin does not know if they reported the graffiti to their boss Paul Rosequist,
16 who handled the investigation for Gutierrez's "NIGGER" comment. (See Exhibit 10, 174:16-19.)
17 Colvin believed that by reporting this issue to management the issue would be corrected. (See
18 Exhibit 10, at 175:8-13.) Colvin does not know if this graffiti was ever cleaned off because it was
19 not the bathroom he typically used. (See Exhibit 10, at 175:14-21.)

20 On January 3, 2020, Colvin used a bathroom near the yard, where he was assigned, and
21 discovered the graffiti issue escalated and was now more alarming. The top of the graffiti states:
22 "burn all NIGGERS." (See Exhibit 8, at APP032.) Directly under where it says "burn" is an
23 inverted swastika. (See Exhibit 8, at APP032.) Under the inverted swastika, is a drawing of a
24 penis and testicles with rudimentary "SS bolts," reminiscent of Nazi Germany. (See Exhibit 8, at
25 APP032.) Coming out of the penis are two large droplets stating, "Trump 2020." (See Exhibit 8,
26 at APP032.) Under the testicles, it states, "White Power." (See Exhibit 8, at APP032.)

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1 Colvin immediately complained to Julian and Tony from Safety and physically showed
2 Julian the graffiti. (See Exhibit 10, at 168:11-15 & 169:7-11, 20-25.) The area was then Carson
3 taped off. (See Exhibit 10, at 170:12-13.) After Tony looked at the graffiti, he commented to
4 Colvin, "That's some fucked up shit." (See Exhibit 10, at 170:14-17.) Colvin and Ricky cleaned
5 the graffiti off. (See Exhibit 10, at 170:18-23.) Colvin believed that his reports of the graffiti to
6 Tony was sufficient because he was a supervisor in Safety, who was also present during his
7 report of Gutierrez's "NIGGER" comment. (See Exhibit 10, at 130:17-20 & 230:23 to 231:8.)

8 Before Colvin saw the "Burn all NIGGERS...Trump 2020...White Power" graffiti, he had
9 heard a lot of comments about white power and Trump on the job site. (See Exhibit 10, at 228:25
10 to 229:9.) The types of comments he heard included, "all Blacks need to go back to Africa" and
11 "[a]ll Mexicans need to go back to Mexico." (See Exhibit 10, at 229:10-20.) Colvin believes MJ
12 Dean tolerated an atmosphere of white supremacy at the job site in late 2019/early 2020. (See
13 Exhibit 10, at 230:6-10.) Rosequist admits "there were people that support Trump on the job
14 site." (See Exhibit 13, at 20:22-23.)

15 Gutierrez admits he has seen racist graffiti in the bathrooms on the project throughout his
16 time on the job. (See Exhibit 11, at 31:17-21.) Gutierrez claims he reported it to safety, but does
17 not remember who he reported it to. (See Exhibit 11, at 31:22 to 32:1.) Gutierrez has seen racist
18 graffiti in the bathrooms on 200 occasions since he started on the project in 2019. (See Exhibit
19 11, at 33:8-18.) He claims that racist graffiti in the bathrooms is on "ongoing thing in
20 construction." (See Exhibit 11, at 33:15-18.) While Gutierrez did not personally see the "Burn all
21 NIGGERS...Trump 2020...White Power" graffiti, he admits that the graffiti he has seen is like
22 this. (See Exhibit 8, at APP 032; and See Exhibit 11, at 35:14 to 36:18.) He has also seen graffiti
23 such as the "BLACK LABORERS = LAZY!" off and on, claiming its ongoing. (See Exhibit 11,
24 at 39:9-21.) The racist graffiti Gutierrez has seen is also in reference to Hispanics and
25 Caucasians. (See Exhibit 11, at 37:7-8.) He claims it gets reported to safety and just gets cleaned
26 off. (See Exhibit 11, at 37:9-11.)

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F. MJ Dean fails to enforce its anti-discrimination and anti-harassment policies.

Colvin does not believe MJ Dean handled this situation correctly. (*See* Exhibit 10, at 172:1-4.) Colvin believes this issue should have been raised in the weekly meetings, with the management stating that this type of racism will not be tolerated. (*See* Exhibit 10, at 172:6-10.) MJ Dean never raised the issue of racist graffiti in the bathrooms at the weekly meeting. (*See* Exhibit 10, at 172:11-14.) MJ Dean never stated in any of those meetings that the graffiti was intolerable. (*See* Exhibit 12, at 231:9-14.) MJ Dean did not have any anti-harassment or diversity discussions or trainings to prevent future racist graffiti. (*See* Exhibit 10, at 231:15-19.) MJ Dean took no action, despite the fact the pro-Trump white supremacy comments permeated the workplace. (*See* Exhibit 10, at 231:24 to 232:2.)

Thomason claims MJ Dean has “zero tolerance” for harassment and discrimination in its workplace, but he qualified that tolerance to only if there is “proof” that it happened. (*See* Exhibit 12, at 19:9-16.) In actuality, MJ Dean’s policy does not state there is “zero tolerance” for harassment or discrimination. (*See* Exhibit 4, at APP 014-15; and *See* Exhibit 5, at APP 018-019.) MJ Dean only has “zero tolerance” for workplace violence. (*See* Exhibit 4, at APP 012.)

Thomason claims that he is on site five to six days per week and ten hours each day. (*See* Exhibit 12, at 23:2-8.) He claims he is not aware of any racist comments on site because he has never heard such comments. (*See* Exhibit 12, at 24:5-17.) He claims he has not seen or heard about any racist graffiti in the bathrooms. (*See* Exhibit 12, at 24:18 to 25:8.)

He claims that such issues would be addressed in the weekly safety meetings, but he does not attend those meetings. (*See* Exhibit 12, at 25:9-17.) Thomason does not know if the use of racial slurs or racist graffiti was ever discussed in those meetings after Colvin’s various complaints. (*See* Exhibit 12, at 25:18-21.)

The first time Thomason ever heard about the racist graffiti was during his deposition on July 29, 2021. (*See* Exhibit 12, at 26:2-6.) Thomason does acknowledge that the racist graffiti violates MJ Dean’s anti-discrimination policy. (*See* Exhibit 12, at 28:2-4.) Gutierrez never told

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1 Thomason about the white supremacy comments on site. (*See* Exhibit 12, at 44:1-7.) Thomason
2 claims that if he heard of saw racism on site that he would immediately address it with AECOM
3 Hunt's safety personnel. (*See* Exhibit 12, at 30:21 to 31:10.)

4 Rosequist claims he has not seen racist graffiti in the bathrooms at the project, but he
5 does not use the on-site bathrooms; he uses the one in the office. (*See* Exhibit 13, at 15:10-15.)
6 He claims that if he saw such graffiti he would have it immediately removed. (*See* Exhibit 13, at
7 16:10 to 17:3.) The first time he saw such graffiti was during his deposition on August 6, 2021.
8 (*See* Exhibit 13, at 20:10-13.) Rosequist claims he has not seen or heard white supremacist
9 comments, including use of the word "NIGGER," in the two years he has been on the project.
10 (*See* Exhibit 13, at 15:23 to 16:4.) Rosequist admits he never sent Colvin's report regarding
11 Gutierrez calling him a "NIGGER" to Human Resources. (*See* Exhibit 13, at 17:23-25.)

12 Rosequist admits he provides the topics and information discussed at the weekly safety
13 meetings even though he does not attend those meetings. (*See* Exhibit 13, at 18:12-16.) He
14 admits that racist graffiti has not been a topic at those meetings. (*See* Exhibit 13, at 18:17-20.)
15 Regarding the anti-discrimination policy, Rosequist claims it is "possible" it was discussed, but
16 does not know whether it was before or after Colvin's complaints. (*See* Exhibit 13, at 19:5-18.)

17 Gutierrez claims the anti-discrimination policy is discussed at the weekly safety meetings,
18 but he does not remember the last time it was discussed or how many times it was discussed (*See*
19 Exhibit 11, at 40:9-20.) Gutierrez admits there was white supremacy talk on the job site relating
20 to Trump's reelection. (*See* Exhibit 11, at 40:21-25 & 41:8-10.) Instead of reporting these
21 comments to his supervisor, safety, or human resources, Gutierrez just let it go "in one ear and
22 out the other." (*See* Exhibit 11, at 41:19 to 42:2.) Gutierrez admits he did not do anything to
23 report those comments. (*See* Exhibit 11, at 42:11-16.) The last time he saw anti-black graffiti in
24 the bathrooms at the project was two months ago. (*See* Exhibit 11, at 42:18-21.)

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G. MJ Dean directed Gutierrez, Colvin's harasser, to terminate Colvin's employment in April of 2020.

On or about April 6, 2020, Gutierrez personally terminated Colvin's employment. Gutierrez told Colvin he was being laid off and was giving him his final check. (*See* Exhibit 10, at 182:23-25.) Gutierrez attempts to minimize his involvement in Colvin's termination claiming he was "the one that brought the checks," but he admits he is the one who told Colvin he was laid off. (*See* Exhibit 11, at 44:5-10.) However, Gutierrez did not give Colvin his final check and ultimately told him he could pick-up his check the next day. (*See* Exhibit 11, at 182:25 to 183:3.)

Colvin did not understand why he was being laid off because there was work to be done in his area. (*See* Exhibit 10, at 183:8-12.) Muti, his direct supervisor, even told him on that day he would be working in that area by himself the rest of the week because Muti and a few other laborers would be at the other yard. (*See* Exhibit 10, at 190:8-12.)

After Gutierrez fired him, Colvin called Muti to find out what was going on. (*See* Exhibit 10, at 193:8-12.) Muti said, "No, Parnell, you're not supposed to get laid off. You're working there by yourself for the rest of the week, and you the only guy that's for the yard." (*See* Exhibit 10, at 193:16-18.) Muti did not understand why Gutierrez laid Colvin off. (*See* Exhibit 10, at 193:19-21.) Colvin was never given the Termination Notice, dated April 6, 2020, that was signed by Gutierrez. (*See* Exhibit 10, at 204:5-7; and *See* Termination Notice, attached to Appendix Vol. 1 as Exhibit 9, at APP 035.) It is clear Gutierrez did not follow the Termination Policy included in the Office Policy Manual because he was not Colvin's supervisor, nor did he follow the exit interview portion with Human Resources to ensure Colvin timely received his last paycheck. (*See* Exhibit 4, at APP 013.)

When Colvin came back the next day to pick up his check, he noticed that other laborers were assigned to do his work. (*See* Exhibit 10, at 186:3-7 & 188:4-6.) One of the people that replaced him was hired after him. (*See* Exhibit 10, at 186:3-16.) Colvin does not believe the reason listed for his termination is true because the job never actually shut down completely. (*See* Exhibit 10, at 205:12-19.) While certain areas were affected, the yard was not because it had to

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1 be maintained at all times because it is where the trucks bring in all the material for the project.
2 (See Exhibit 10, at 205:12-19.) The other laborers immediately assigned to the yard shows
3 Colvin was replaced. (See Exhibit 10, at 186:3-7 & 188:4-6.)

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5 **H. MJ Dean shutdown its operations on the Sphere project for one week due to COVID-19.**

6 While MJ Dean claims the job site shutdown because of COVID-19, it was only a one-
7 week shutdown and laborers were then called back. (See Exhibit 10, at 185:4-15; and See Exhibit
8 12, at 32:25 to 33:1.) Despite the one week shutdown, a portion of construction continued during
9 that week for MJ Dean. (See Exhibit 12, at 33:2-10.) The week pause on construction occurred in
10 mid-April of 2020. (See Exhibit 12, at 35:3-8.) Thomason decided who to lay off for the
11 shutdown. (See Exhibit 12, at 36:17-19.) Even though they were directed to haul and store
12 everything stored in the yard off-site, Thomason admits they never did. (See Exhibit 12, at 37:7-
13 18.)

14 MJ Dean brought approximately 200 people back to work at the Sphere after the COVID-
15 19 shutdown. (See Exhibit 12, at 35:9-17.) Thomason admits there was no effort to ensure a
16 diverse workforce was brought back to work on the project after the shut down. (See Exhibit 12,
17 at 47:15-18.) Thomason does not know why Colvin was not brought back. (See Exhibit 12, at
18 42:14-17.) As of July of 2021, MJ Dean was still doing construction on the Sphere project, and
19 Gutierrez is still the general foreman. (See Exhibit 12, at 35:18-22 & 43:23-25.)

20 In April of 2020, 5% of the MSG Sphere was completed, which can be compared to the
21 20% of completion in July of 2021. (See Exhibit 12, at 33:11-18.) The project is still expected to
22 be completed in 2023, which is the original completion year contemplated for the project. (See
23 Exhibit 12, at 15:4-8 & 34:6-8.)

24 **III. STATEMENT OF UNDISPUTED FACTS**

- 25 1. Racist graffiti has appeared in the bathrooms at the Sphere project 200 different
26 times. (See Exhibit 11, at 33:8-18.)
27 2. Racism at the Sphere project is an ongoing issue. (See Exhibit 11, at 33:15-18.)

28 ////

- 1 3. Gutierrez reported the 200 instances of racist bathroom graffiti he saw at work to
2 Safety. (*See* Exhibit 11, at 31:22 to 32:1.)
- 3 4. Gutierrez never reported the white supremacist comments he heard at work. (*See*
4 Exhibit 11, at 40:21-25, 41:8-10, & 41:19 to 42:2.)
- 5 5. Gutierrez admits he is supposed to report racial slurs and racist graffiti to
6 Rosequist in Safety. (*See* Exhibit 11, at 22:15-25, 23:11-17, & 42:11-16.)
- 7 6. Gutierrez was initially Colvin's supervisor. (*See* Exhibit 3; and *see* Exhibit 10, at
8 89:2-4.)
- 9 7. Gutierrez is MJ Dean's General Foreman. (*See* Exhibit 11, at 7:1-3.)
- 10 8. Thomason never conducted meetings or trainings regarding MJ Dean's anti-
11 discrimination and harassment policies. (*See* Exhibit 12, at 25:9-17.)
- 12 9. Thomason does not know whether any meetings or trainings occurred following
13 Colvin's complaints regarding the racially hostile work environment. (*See* Exhibit
14 12, at 25:18-21.)
- 15 10. Rosequist never conducted meetings or trainings regarding MJ Dean's anti-
16 discrimination and harassment policies. (*See* Exhibit 13, at 18:12-16 & 19:5-18.)
- 17 11. While Rosequist decides what information is discussed at weekly safety meetings,
18 he does not know if he had the anti-discrimination and harassment policies
19 discussed. (*See* Exhibit 13, at 18:12-16 & 19:5-18.)
- 20 12. Rosequist does not attend weekly safety meetings. (*See* Exhibit 13, at 18:12-16.)
- 21 13. MJ Dean did not discuss the anti-discrimination and harassment policies at the
22 weekly safety meetings following Colvin's complaints. (*See* Exhibit 12, at 25:18-
23 21; and *see* Exhibit 13, at 19:5-18.)
- 24 14. Rosequist never submitted Colvin's complaint regarding Gutierrez calling him a
25 "nigger" to Human Resources. (*See* Exhibit 13, at 17:23-25.)
- 26 15. Neither Tony nor Julian from Safety reported the numerous instances of racist
27 bathroom graffiti to Rosequist. (*See* Exhibit 13, at 15:10-15, 16:10 to 17:3, &
28 20:10-13.)

1 16. MJ Dean tolerates racism in its workplace. (*See* Exhibit 12, at 25:18-21; and *see*
2 Exhibit 13, at 17:23-25, 18:12-20, & 19:5-18.)

3 17. MJ Dean did not follow its termination policy when it had Gutierrez terminate
4 Colvin, instead of Muti, Colvin's supervisor. (*See* Exhibit 4, at APP013.)

5 18. MJ Dean did not follow its termination policy when it allowed Gutierrez to
6 terminate Colvin without providing him his final check. (*See* Exhibit 4, at
7 APP013.)

8 19. MJ Dean directed Colvin be terminated by Gutierrez who called Colvin a
9 "NIGGER" five months earlier. (*See* Exhibit 12, at 36:17-19.)

10 20. Colvin was terminated three months after he complained of racist bathroom
11 graffiti. (*See* Exhibit 10, at 168:11-15& 169:7-11, 20-25; and *see* Exhibit 9, at
12 APP035.)

13 21. MJ Dean's claim Colvin was "laid off" because the project shutdown is
14 pretextual. (*See* Exhibit 10, at 186:3-16, 188:4-6, & 205:12-19.)

15 22. The Sphere project was only shut down for one week. (*See* Exhibit 12, at 32:25 to
16 33:10 & 37:7-18.)

17 23. During the shutdown, some work continued. (*See* Exhibit 12, at 33:2-10.)

18 24. MJ Dean replaced Colvin. (*See* Exhibit 10, at 186:3-7 & 188:4-6.)

19 **IV. LEGAL ARGUMENT**

20 Summary judgment is appropriate when, viewing the facts in the light most favorable to
21 the nonmoving party, there is no genuine issue of material fact that would preclude summary
22 judgment as a matter of law. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996); Fed.R.Civ.P.
23 56(c). The materiality of a fact is based upon the substantive law of the underlying claim.
24 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

25 The moving party bears the burden of proving there is no genuine issue of material fact,
26 through the use of authenticated evidence, to show that they are entitled to judgment as a matter
27 of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *See Orr v. Bank of America*, 285 F.3d
28 764 (9th Cir.2002). The burden then shifts to the nonmoving party, to survive summary

1 judgment, to establish that there are specific material facts in dispute through use of authenticated
 2 evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *see Orr*,
 3 285 F.3d at 773.

4 Here, Colvin seeks summary judgment on his claims of (1) Negligent Training and
 5 Supervision and (2) Retaliation in violation of Title VII. There are no genuine issues of material
 6 fact regarding M.J. Dean's liability for these claims, which are discussed below.

7
 8 **A. M.J. Dean failed to properly train its management how to remedy and
 prevent a racially hostile work environment.**

9 Title VII prohibits discrimination "against any individual with respect to his
 10 compensation, terms, conditions, or privileges of employment, because of such individual's . . .
 11 race." 42 U.S.C. § 2000e-2(a)(1). "This prohibition encompasses the creation of a hostile work
 12 environment, which violates Title VII's guarantee of 'the right to work in an environment free
 13 from discriminatory intimidation, ridicule, and insult.'" *McGinest v. GTE Serv. Corp.*, 360 F.3d
 14 1103, 1112 (9th Cir. 2004) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct.
 15 2399 (1986)). "Courts have long recognized that a workplace in which racial hostility is
 16 pervasive constitutes a form of discrimination." *Id.* (quoting *Woods v. Graphic Communications*,
 17 925 F.2d 1195, 1200 (9th Cir. 1991).)

18 The determination of whether a hostile work environment exists considers whether the
 19 harassment is "sufficiently severe and pervasive to alter the conditions of the victim's
 20 employment and create an abusive work environment" in light of "all the circumstances." *Id.* at
 21 1112-13 (internal citations omitted). If the hostile conduct at issue "pollutes the victim's
 22 workplace, making it more difficult for [him] to do [his] job, to take pride in [his] work, and to
 23 desire to stay on in [his] position," then a hostile work environment exists. *Id.* at 1113.

24 "The omnipresence of race-based attitudes and experiences in the lives of black
 25 Americans [may cause] even nonviolent events to be interpreted as degrading, threatening, and
 26 offensive." *Id.* at 1116. This is why "Title VII tolerates no racial discrimination, subtle or
 27 otherwise." *Id.* The Ninth Circuit has analyzed the use of the word "nigger" in relation to a
 28 hostile work environment, stating:

1 It is beyond question that the use of the word ‘nigger’ is highly offensive and
2 demeaning, evoking a history of racial violence, brutality, and subordination. This
3 word is ‘perhaps the most offensive and inflammatory racial slur in English...a
word expressive of racial hatred and bigotry.

4 *Id.* “No word in the English language is as odious or loaded with a terrible history.” *Id.* (quoting
5 *Daso v. The Grafton School, Inc.*, 181 F.Supp.2d 485, 493 (D. Md. 2002).

6 “Employers are liable for failing to remedy or prevent a hostile or offensive work
7 environment of which management-level employees knew, or in the exercise of reasonable care
8 should have known.” *McGinest*, 360 F.3d at 1119. To avoid liability, the employer must take
9 “remedial measures reasonably calculated to end the harassment.” *Id.* at 1120 (internal quotations
10 omitted). “Inaction constitutes a ratification of past harassment, even if such harassment
11 independently ceases.” *Id.* “[R]emedial actions must be designed not only to prevent future
12 conduct by the harasser, but also by other potential harassers.” *Id.* at 1121.

13 An “employer has a duty to use reasonable care in the training, supervision, and retention
14 of his or her employees to make sure that the employees are fit for their positions.” *Hall v. SSF,*
15 *Inc.*, 930 P.2d 94, 99 (Nev. 1996). “The tort of negligent training and supervision imposes direct
16 liability on the employer if (1) the employer knew that the employee acted in a negligent manner,
17 (2) the employer failed to train or supervise the employee adequately, and (3) the employer’s
18 negligence proximately caused the plaintiff’s injuries.” *Helle v. Core Home Health Servs. of*
19 *Nev.*, 124 Nev. 1474, 238 P.3d 818, 2008 WL 6101984, at *3 (Nev. 2008) (internal footnotes
20 omitted) (citing *Hall*, 930 P.2d at 99; *Oehler v. Humana, Inc.*, 775 P.3d 1271, 1272 (Nev. 1989)).

21 Here, MJ Dean failed to properly train its management (including Thomason, Rosequist,
22 Gutierrez, and Tony and Julian of Safety) how to remedy a racially hostile work environment.
23 Those managers did nothing to remedy the use of racial slurs and the racist graffiti in the
24 bathrooms. While they allude to the possibility that such issues could be addressed during the
25 weekly safety meetings, the evidence is clear that the racial hostility on the jobsite was never
26 directly addressed by MJ Dean.

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28 ////

1 Gutierrez is a great example. After he called Colvin a “NIGGER,” Thomason and/or
2 Rosequist should have discussed MJ Dean’s supposed “zero tolerance” for racial slurs with
3 Gutierrez and all other employees on site. From Rosequist’s testimony, it is clear that once
4 Gutierrez denied the comment, Rosequist ended the discussion.

5 Additionally, as a General Foreman, Gutierrez was required to report all racial comments
6 and graffiti to his supervisor. Gutierrez admits he heard white supremacist comments on site and
7 saw racist graffiti in the bathrooms on approximately 200 occasions since he started on the
8 project in 2019. (*See* Exhibit 11, at 33:8-18 and 42:11-16.) That’s an average of eight separate
9 instances of racist graffiti per month. Gutierrez admits he never reported these issues. The last
10 time he saw anti-black graffiti was in approximately May of 2021. (*See* Exhibit 11, at 42:18-21.)

11 It is clear that MJ Dean does nothing to prevent or remedy its racially hostile work
12 environment. Even its Office Policy Manual acknowledges that the directives in the are only a
13 guide for management and “are merely descriptive of suggested procedures.” (*See* Exhibit 4, at
14 APP 008.) While the manual claims MJ Dean commits itself to “providing an excellent work
15 environment,” the company has failed to properly train its management how to prevent and
16 remedy a racially hostile work environment. (*See* Exhibit 4, at APP 010.) Gutierrez’s admission
17 of hearing white supremacist comments and seeing racist graffiti is a far cry from the “excellent
18 work environment” MJ Dean commits to in its manual. Gutierrez should have reported the
19 racism he saw and heard.

20 Regarding Colvin’s complaints, Thomason and Rosequist should have properly counseled
21 Gutierrez, instead of simply taking him at his word. Their duty is to prevent future racism, which
22 also required them to address the use of racial slurs at a meeting or training. There is no evidence
23 they did either.

24 Regarding the racist graffiti, Tony and Julian from Safety should have reported it to
25 Thomason and Rosequist. It appears the graffiti was never reported, by Tony or Julian to
26 Rosequist, and MJ Dean never did anything to try to stop the graffiti. As Gutierrez testified, the
27 graffiti is an ongoing issue, with anti-black graffiti appearing in the bathrooms as recent as May
28 of 2021. (*See* Exhibit 12, at 24:5 to 25:8; and *See* Exhibit 13, at 15:10 to 16:14.)

1 Thomason and Rosequist's claims that they have never seen or heard racism on the job site
2 shows they were fully in the dark or simply do not care.

3 While it is clear that Colvin and Gutierrez did not historically see eye to eye, they do
4 agree about one thing: the racist graffiti on the Sphere job site is out of control. The prevalence of
5 this graffiti, including the recent anti-black graffiti in May of 2021, shows MJ Dean has
6 completely failed to use reasonable care in training and supervising its employees regarding its
7 anti-discrimination and harassment policies. By allowing this racial hostility to continue for two
8 years, MJ Dean knew it was acting in a negligent manner. They claim "zero tolerance," yet their
9 actions show that they willingly tolerate racism, in violation of their policies and Title VII. The
10 manuals show MJ Dean knows better.

11 MJ Dean's tolerance of racism in the workplace shows none of its employees and
12 supervisors were actually trained regarding the anti-discrimination and harassment policies. Even
13 if there was training, it is clear there was a failure to supervise, wherein those policies would be
14 enforced. As a result, Colvin was subjected to a racially hostile environment that he opposed. MJ
15 Dean ignored his complaints, in favor of its tolerance for racism in the workplace.

16 Because there are no facts in dispute regarding MJ Dean's failure to train and supervise,
17 this Court may grant Colvin summary judgment on liability for Colvin's Negligent Training and
18 Supervision cause of action.

19
20 **B. M.J. Dean retaliated against Colvin after he complained of being called a
"nigger" by his supervisor and seeing racist graffiti in the bathroom.**

21 An employer may not retaliate against an employee because that employee has opposed
22 an unlawful employment practice. 42 U.S.C. § 2000e-3(a). Conduct is discriminatory when its
23 rejection by an employee, "is used as the basis for employment decisions" that affect the
24 employee. 29 C.F.R. § 1604.11(a). To engage in a protected activity, the employee must have "an
25 objectively, reasonable belief, in good faith, that the activity he opposes is unlawful under Title
26 VII." *Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001).

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1 To establish a *prima facie* case of retaliation under Title VII, the plaintiff must show that
2 he “engaged in a protected activity, [was] subsequently subjected to an adverse employment
3 action, and that a causal link exists between the two.” *Dawson v. Entek Int’l.*, 630 F.3d 928, 936
4 (9th Cir. 2011). “The antiretaliation provision of Title VII prohibits any employer action that well
5 might have dissuaded a reasonable worker from making or supporting a charge of
6 discrimination.” *Thompson v. Morth American Stainless, LP*, 562 U.S. 170, 131 S.Ct. 863, 868
7 (2011).

8 In order to prove retaliation, the employee must be able to show causation in fact.
9 *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517,
10 2524-25 (2013). This standard requires the employee “to show that the harm would have
11 occurred in the absence of– that is, but for – the defendant’s conduct.” *Id.* at 2525 (internal
12 quotations omitted). This causation standard is not the same as the standard used for claims
13 based on status-based discrimination. *Id.* at 2533. In cases where an adverse employment action
14 is taken “within a reasonable period of time” after the plaintiff engages in a protected activity,
15 “retaliatory intent may be inferred.” *Passantino v. Johnson & Johnson Consumer Products, Inc.*,
16 212 F.3d 493, 507 (9th Cir. 2000).

17 Here, Colvin was terminated three months after his last complaint regarding the racist
18 bathroom graffiti. MJ Dean’s retaliatory motive is derived from the fact that it allowed Gutierrez
19 (the General Foreman that called Colvin a “nigger” five months earlier) to personally terminate
20 Colvin’s employment. The Office Policy Manual’s termination provision shows MJ Dean did not
21 follow that policy for this termination because the supervisor does the terminations. At the time
22 of Colvin’s termination, Muti was his supervisor, not Gutierrez.

23 This breach of policy, coupled with allowing Colvin’s termination by his harasser shows
24 MJ Dean’s retaliatory motive that Colvin was being terminated because he complained about
25 being called a “nigger” by Gutierrez and the racist bathroom graffiti. MJ Dean picked sides, and
26 it sided with Gutierrez, the person that did not report 200 instances of racist bathroom graffiti and
27 let white supremacy comments “go in one ear and out the other.”

28 ////

1 Because MJ Dean had Gutierrez (Colvin's harasser) terminate Colvin, instead of his
2 supervisor (Muti), this Court may grant Colvin summary judgment on liability on his Retaliation
3 cause of action because there are no material facts in dispute.

4 **V. CONCLUSION**

5 For the foregoing reasons, this Court should grant Colvin's Motion for Partial Summary
6 Judgment on Liability on his claims of (1) Negligent Training and Supervision and (2)
7 Retaliation in violation of Title VII.

8 DATED this 8th day of October, 2021.

9 LAW OFFICE OF DANIEL MARKS

10
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DECLARATION OF NICOLE M. YOUNG, ESQ.

NICOLE M. YOUNG, ESQ., hereby declares under penalty of perjury, under the law of the State of Nevada:

1. That I am an attorney representing the plaintiff in this proceeding. I have personal knowledge of and am competent to testify to the facts set forth herein.
2. That appended as Exhibit 1 is a true and correct copy of the Charge of Discrimination that was filed with the EEOC and produced by Plaintiff in this case.
3. That appended as Exhibit 2 is a true and correct copy of the Notice of Right to Sue Plaintiff received by the EEOC, dated June 25, 2020, which was produced by Plaintiff in this case.
4. That appended as Exhibit 3 is a true and correct copy of the New Hire Package Requirements produced by Defendant in this case.
5. That appended as Exhibit 4 is a true and correct copy of an excerpt from the MJ Dean Office Policy Manual produced by Defendant in this case.
6. That appended as Exhibit 5 is a true and correct copy of an excerpt of the MJ Dean Code of Safe Practices & Anti-Drug and Harassment Policies produced by Defendant in this case.
7. That appended as Exhibit 6 is a true and correct copy of the Employee Incident Investigation Report prepared by Parnell Colvin, dated November 14, 2019, which was produced by Defendant in this case.
8. That appended as Exhibit 7 is a true and correct copy of the Text messages between John Thomason and Parnell Colvin that were produced by Defendant in this case.
9. That appended as Exhibit 8 is a true and correct copy of the Photos of Racist Bathroom Graffiti that were taken by Parnell Colvin and produced by Plaintiff in this case.

////

10. That appended as Exhibit 9 is a true and correct copy of the Termination Notice, dated April 6, 2020, which was produced by Defendant in this case.

11. That appended as Exhibit 10 is a true and correct copy of the Deposition of Parneel Colvin, taken on July 15, 2021, authenticated by the Court Reporter at APP 253.

12. That appended as Exhibit 11 is a true and correct copy of the Deposition of Kevin Gutierrez, taken on July 29, 2021, authenticated by the Court Reporter at APP301.

13. That appended as Exhibit 12 is a true and correct copy of the Deposition of John Thomason, taken on July 29, 2021, authenticated by the Court Reporter at APP352.

14. That appended as Exhibit 13 is a true and correct copy of the Deposition of Paul Rosequist, taken on August 6, 2021, authenticated by the Court Reporter at APP383.

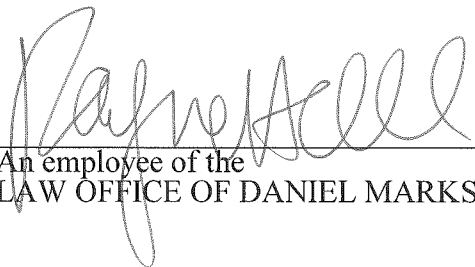
DATED this 8th day of October, 2021.

NICOLE M. YOUNG, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 7 day of October, 2021, I did serve a true and correct copy of the above and foregoing **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY** by way of Notice of Electronic Filing provided by the court mandated ECF filing service, upon the Defendant at the following:

Robert Rosenthal
Howard & Howard Attorneys Pllc
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169
Attorneys for Defendant



An employee of the
LAW OFFICE OF DANIEL MARKS